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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Taxpayers' expenditures for travel, meals, and lodging while employed at Kinston, their post of duty, were not incurred "while away from home" within the meaning of Section 23 (a) (1) (A) of the Internal Revenue Code of 1939, and hence do not qualify as deductible business expenses	12
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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 18–29) are reported at 27 T. C. 149. The opinion of the Court of Appeals (R. 33–39) is reported at 254 F. 2d 483.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1957. (R. 40.) On February 10, 1958, by order of Mr. Chief Justice Warren, the time for filing a petition for certiorari on behalf of the taxpayers was extended to and including April 11, 1958. (R. 41.) Taxpayers' petition for certiorari was filed on April 9, 1958, and was granted on May

19, 1958. (R. 42.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in the circumstances of this case, amounts expended by taxpayers for board and lodging while employed at a job site, and for transportation therefrom to their family residences after termination of the employment, are deductible business travel expenses under 23 (a) (1) (A) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Sections 22 (n), 23 (a), and 24 (a) of the Internal Revenue Code of 1939, and Sections 39.22 (n)–1, 39.23 (a)–1 and 39.23 (a)–2 of Treasury Regulations 118, are set forth in the Appendix, *infra*, pp. 35–38.

STATEMENT

INTRODUCTION

The taxpayer James E. Peurifoy is a pipe welder. Since August 13, 1951, he has been a member of Local No. 329, with headquarters in Wilmington, North Carolina, of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The taxpayer Stines is a journeyman plumber and the taxpayer Hall is a welder. Since 1947 and 1952, respectively, they have been members of Local No. 785 of the same union, with headquarters at Raleigh, North Carolina. They all obtain employment through their local union, which

sends them to various work sites where they are then hired by the employer. (R. 19.)

Members of local unions are often sent to other jurisdictions for work. In the case of a large project, journeymen workers, as distinguished from foremen or superintendents, may be drawn from various states. Where a job requires more skilled craftsmen than a local union has available in the area, the local union will deal with other local unions in the same state or other states in order to procure the necessary workers. If this does not produce sufficient workmen, the national union will procure journeymen and apprentices from all over the country. A journeymen craftsman working on construction projects may have several different employers in the course of a year or, even though he may work for one employer throughout a year, he may work at several different job sites. In the building and construction industry, some construction jobs (such as the Atomic Energy projects) may run for a period of years, but the general run of jobs is for a period of a few weeks or for a few months. (R. 19–20.)

TAXPAYER PEURIFOY

Peurifoy is, and was during the year 1953, an unmarried individual. During the entire year 1953, he owned and maintained a residence at Kure Beach, North Carolina, which is about 20 miles from Wilmington. He actually resides there when he is employed in the vicinity of Wilmington and returns to this residence on weekends if the place of employment

is within a reasonable distance. He uses his own automobile for transportation. (R. 20.)

He was first employed by the Piping Equipment Company with main offices in Greensboro, North Carolina, to work on a paper mill at Acme, North Carolina. He worked on this project from about August 13, 1951, until about March 10, 1952. (R. 20.)

He was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina. He worked on this project from March 10, 1952, until November 20, 1953 (20½ months). While so employed, he roomed and boarded near Kinston and from January 1, 1953, through November 20, 1953, he expended for room and board the sum of $496. The distance from his home in Kure Beach to the duPont plant is approximately 122 miles. The cost to him of driving his automobile from Kinston to Kure Beach after termination of this employment was $8.54. (R. 20.) This is the employment involved on this appeal with respect to Peurifoy.

He was next employed by the Grinnell Company to work on the Carolina Light and Power Company plant at Mount Misery, North Carolina, situated about 7 miles from Wilmington. He worked on this project from November 30, 1953, through May 14, 1955, and while he worked on this project he resided in his residence at Kure Beach. Thereafter, in 1955, he worked at Cherry Point, North Carolina, for 3 months, at Acme, North Carolina, for 2 weeks, and at Barberton, Ohio, for about one week. (R. 20.)

In his return for 1953, he deducted the amount of $1,920.80 from gross income as "Subsistence and temporary quarters necessary for earning income, not reimbursed by employer." The Commissioner disallowed the entire claimed deduction on the ground that payment thereof had not been proved and that even if paid the expenditure represented personal and living expenses. (R. 21.)

TAXPAYER STINES

Paul V. Stines and Betty O. Stines are husband and wife. Betty O. Stines appears as a taxpayer by virtue of having joined in the filing of the income tax return for 1953. During the entire year 1953, they maintained a residence in Raleigh, North Carolina, and had maintained such residence since sometime in 1952. Betty O. Stines and the taxpayers' minor child actually resided in such residence during the entire year 1953. (R. 21.)

Since 1947, when he became a member of the union, the taxpayer Paul V. Stines has had about 30 jobs ranging in duration from two weeks to over a year. He worked for one employer for over two years but on different jobs in different locations. He was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina, from March 26, 1952, until about April 10, 1953 (12½ months), when he left for "personal reasons." (R. 12.) While so employed, he rented a room at Kinston, North Carolina, and ate his meals in restaurants. During 1953 he expended

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$262.50 for room and board. The distance from Raleigh to Kinston by automobile is approximately 78 miles and the distance from Kinston to the plant site is approximately an additional 8 miles. He drove his car or rode with others from his residence in Raleigh to his rooming house in Kinston and returned once a week. The cost to him, under his car-pool arrangement, for transportation from Kinston to Raleigh upon termination of his work in Kinston was $1.09. While employed at Kinston he received 14.8 cents per hour greater than the normal union scale in accordance with the agreement between the Grinnell Company and the union. All union employees received this additional amount regardless of where they were living. This extra amount was intended to compensate the employees for time expended in going from the town of Kinston to the job site and return. (R. 21.) This is the employment involved on this appeal with respect to Stines.

He was next employed by Carl B. Mims of Raleigh from about April 13, 1953, to about April 28, 1953, to work in and around the environs of Raleigh. (R. 22.)

He then worked for A. L. Wright and Company, Inc., of Portsmouth, Virginia, from about May 6, 1953, to about June 23, 1953, when he quit for personal reasons. This work was performed on the Westinghouse plant near Raleigh. (R. 22.)

His next employment was with Markowitz Brothers, Inc., of Miami, Florida, to work on an airbase near Charleston, South Carolina. He worked there from about June 23, 1953, to about July 15, 1953. (R. 22.)

He was next employed by Biemann and Rowell of Raleigh, North Carolina, from August 1, 1953, through December 31, 1953. While so employed he was loaned by his employer to Garrison and Hopkins Company, Inc., of Charlotte, North Carolina, to work on the S. H. Kress Company job in Raleigh, and to Cooper and Goodwin of Raleigh to work from December 9, 1953, through December 30, 1953, in and around the environs of Raleigh. He also worked for Garrison and Hopkins Company, Inc., at Fort Bragg, North Carolina, for approximately 7½ weeks during 1953 (R. 22.)

In their return for the year 1953, the taxpayers Paul V. and Betty O. Stines deducted the amount of $2,480 from gross income for "Subsistence and quarter [*sic*] non reimbursable by employer necessary to earning income." The Commissioner disallowed the deduction for the same reasons as in the case of the taxpayer Peurifoy. (R. 22.)

TAXPAYER HALL

John S. Hall and Doris D. Hall are husband and wife. They have three minor children. During the entire year 1953 they maintained a residence in Raleigh, North Carolina. They maintained such residence for approximately 4 years ending in the early part of 1954. Doris D. Hall and the three children actually resided there during the entire year 1953. (R. 23.)

The taxpayer John S. Hall was first employed in 1952 by the Grinnell Company of Charlotte, North Carolina, to work on the Burlington Mills plant at

Neuse, North Carolina, and worked on this project until it was completed in that year. (R. 23.)

He was next employed by the Grinnell Company to work on the duPont plant at Kinston, North Carolina, and worked on this project from October 21, 1952, through July 10, 1953 (8½ months). He resigned for "personal reasons." (R. 16.) While working on the duPont plant at Kinston, he expended $530.13 for room and board during the period January 1, 1953, through July 10, 1953. During this time he returned to Raleigh on weekends. The cost to him of his transportation from Kinston to Raleigh after termination of his employment was $2.01. While he was employed on this project, he received 14.8 cents per hour greater than the normal union scale (see *supra*, p. 6). (R. 23.) This is the employment involved on this appeal with respect to Hall.

He was next employed by A. L. Wright and Company, Inc., of Portsmouth, Virginia, to work on the Westinghouse plant under construction in Raleigh. He worked on this project from July 13, 1953, until the project was completed on March 5, 1954. (R. 23.)

Thereafter, in 1954 and 1955, he worked at Portsmouth, Ohio, for about 3½ months; at Aiken, South Carolina, for about two weeks; at Hopewell, Virginia, for about seven months; at Tarboro, North Carolina, for one month; and at Moncure, North Carolina, on two successive jobs of three months each. (R. 23.)

The taxpayers John S. Hall and Doris D. Hall filed separate individual income tax returns for the year 1953. In his return for 1953, the taxpayer John S. Hall deducted from gross income the amount of

$1,556.60 as "Subsistence and quarters nonreimbursable by employer necessary to earning income." The Commissioner disallowed the claimed deduction of $1,556.60 for the same reasons as in the case of the other taxpayers herein. (R. 23–24.)

PROCEEDINGS BELOW

The Tax Court sustained the claimed deductions. The Tax Court held that the taxpayers' employment at Kinston was "temporary," and that therefore their expenditures for food and lodging while engaged in work there and for transportation therefrom to their residences upon termination of the employment were incurred "while away from home" within the meaning of Section 23 (a) (1) (A). (R. 24, 29.)

The Government appealed to the Court of Appeals for the Fourth Circuit on the factual issue of whether the Tax Court erred in finding that taxpayers' employment at Kinston was temporary. The Government contended that the taxpayers had failed to meet their burden of proof on that issue, even assuming that the taxpayers would otherwise qualify for the deduction. The Court of Appeals agreed with this contention, held that the Tax Court's finding that the work was temporary was clearly erroneous (Rule 52 (a), F. R. Civ. P.), and accordingly reversed the Tax Court's judgment. (R. 39.)

SUMMARY OF ARGUMENT

Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 authorizes the deduction of all the ordinary and necessary expenses paid or incurred during

the taxable year in carrying on any trade or business, including traveling expenses "while away from home" in the pursuit of a trade or business. *Commissioner* v. *Flowers*, 326 U. S. 465. In the Commissioner's view, the taxpayers here are not entitled to the deductions claimed as travel expenses because they were not incurred "while away from home."

A

1. The administrative rulings and the decisions of the Tax Court have uniformly held for years that "home" within the meaning of the statute means a taxpayer's abode at his regular post of duty, and hence only when a taxpayer is away from there is he entitled to the travel expense deduction. Several courts of appeals have recently so held also, and none since this Court's *Flowers* decision has held that "home" can be anywhere else other than at taxpayer's regular post of duty, even though he and his family may actually reside somewhere other than in the area of his post of duty.

Logic as well as authority requires this definition of "home." All taxpayers engaged in trade or business must incur living expenses for food and lodging, wherever they may keep their living quarters, and Section 24 denies the deduction of such personal expenses "in any case." The patent objective of Section 23 (a) (1) (A) is to extend relief to a taxpayer who in pursuit of his trade or business must travel temporarily or intermittently away from the locality which is his regular post of duty. The view that "home" must be read literally as the place where

taxpayer may choose to reside, irrespective of the location of his post of duty, would produce the incongruous result that subsistence and commuting expenses would remain nondeductible under Section 24 if the taxpayer had his living quarters in the locality of his post of duty, but would be transformed into deductible business traveling expenses under Section 23 if he chose to maintain, in addition to living quarters in the neighborhood of his business, separate living quarters elsewhere which he regarded as his residence. Such a view finds no support in the language or legislative history of the statute.

2. If the deductibility of taxpayers' expenditures while employed at Kinston is governed by the general rule that an employee's post of duty is his tax "home", it necessarily follows that the expenditures are nondeductible since Kinston was plainly their post of duty. Upon the general rule, however, has been engrafted an exception which the Tax Court applied in the instant case. The Tax Court held that taxpayers' employment at Kinston was only temporary, as distinguished from indefinite or indeterminate, and that they therefore were entitled to the travel expense deduction because their family residences were located elsewhere. In effect, the Tax Court held that a taxpayer's post of duty is his tax home except when that post of duty is temporary, in which case his family residence may be his tax home. Assuming that such an exception is justified, it must be construed narrowly and strictly.

B

Numerous Tax Court decisions establish that, to prove temporary employment, a taxpayer has the burden of showing, not only that the employment period was actually short, but also that, prior to its commencement, it was anticipated to be short. But analysis of the evidence presented in this case demonstrates that the taxpayers failed to meet that burden. Therefore the Court of Appeals properly rejected, as clearly erroneous, the Tax Court finding that the employments were temporary. At the very least, it is clear that the question is factual in nature and "that the Court of Appeals has made a 'fair assessment' of the record" (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401). In these circumstances, we suggest that this Court should not undertake an independent examination of the evidence to determine how this factual issue should be resolved.

ARGUMENT

TAXPAYERS' EXPENDITURES FOR TRAVEL, MEALS, AND LODGING WHILE EMPLOYED AT KINSTON, THEIR POST OF DUTY, WERE NOT INCURRED "WHILE AWAY FROM HOME" WITHIN THE MEANING OF SECTION 23 (a) (1) (A) OF THE INTERNAL REVENUE CODE OF 1939, AND HENCE DO NOT QUALIFY AS DEDUCTIBLE BUSINESS EXPENSES

In *Commissioner* v. *Flowers*, 326 U. S. 465, this Court enumerated three basic requirements which must be satisfied before a traveling expense deduction may be allowed under Section 23 (a) (1) (A) of the

Internal Revenue Code of 1939 (Appendix, *infra*, p. 35).[1] These requirements are (p. 470):

> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred "while away from home."
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

The Court stated (p. 469) that it had granted certiorari in that case because of a conflict between the Fifth Circuit decision in *Flowers,* 148 F. 2d 163, and the Fourth Circuit decision in *Barnhill* v. *Commissioner,* 148 F. 2d 913, with respect to the meaning of the word "home" in condition (2) above. Citing *Barnhill,* the Court noted (pp. 471–472) that the Tax Court and the administrative rulings had consistently defined the word "home" as the equivalent of the taxpayer's place of business. On the other hand, said the Court, the Fifth Circuit's *Flowers* decision and *Wallace* v. *Commissioner,* 144 F. 2d 407 (C. A. 9th), had flatly rejected that view and had confined the term to the taxpayer's actual residence. The Court found it

[1] This provision was carried over without substantive change to the 1954 Code, 26 U. S. C. (Supp. V) 162 (a) (2).

unnecessary to enter into or resolve that conflict, deciding rather that the taxpayer in *Flowers* was not entitled to the deduction in any event because the expense was not incurred in pursuit of business.[2]

Now once again the question of he meaning of the word "home" arises in this Court. In this case too, certiorari was sought (Pet. 11), and perhaps granted, on the ground of conflict with *Wallace* v. *Commissioner, supra.* In their extensive brief on the merits, however, the taxpayers apparently do not defend the *Wallace* view, which, as we shall show (*infra*, pp. 17-

[2] The Court of Appeals (R. 38)—correctly, we believe—interpreted this Court's decision in *Flowers* to hold that, in order to qualify for the travel expense deduction under Section 23 (a) (1) (A), the travel of a taxpayer who is an employee must be in pursuance of the employer's business. If so, the travel of the taxpayers in the instant case clearly did not qualify. They were not hired by the employer at Kinston until after they arrived there; and, after they were hired, their employer did not require them to travel. They, like Flowers, were only required by the employer to be at the job site as the exigencies of business demanded. That taxpayers chose to maintain abodes also at Raleigh (78 miles away) and Wilmington (122 miles away), respectively, was of no benefit to their employer. And the cost of their transportation from Raleigh and Wilmington, respectively, to Kinston and return, represented only the cost of moving from one location to find or take employment in a new location. Such transportation costs have never been deductible under Section 23 (a) (1) (A). *United States* v. *Woodall* (C. A. 10th), decided May 6, 1958 (1958 C. C. H., par. 9547); *Tyler* v. *Commissioner*, 13 T. C. 186; *Bixler* v. *Commissioner*, 5 B. T. A. 1181; *McClain* v. *Commissioner*, 2 B. T. A. 726.

The deductions claimed in the case at bar were denied by the Commissioner solely on the theory that taxpayers were not away from home, and appeal was taken to the Court of Appeals only on the ground that the Tax Court erred in finding that taxpayers' post of duty at Kinston was "temporary." The Court of Appeals reversed that finding, and thus had no occasion to

19), has atrophied from lack of acceptance and disuse. Indeed, taxpayers do not even cite *Wallace*, except incidentally in the course of a quotation from the *Flowers* opinion (Br. 38).[3]

The *Wallace* case apart, there is no disagreement as to the controlling legal criteria. Accordingly, as we see the case, the central issue here is purely one of fact—*i. e.*, whether the taxpayers met their burden of proving that their employment at Kinston was "temporary." The Court of Appeals held that the taxpayers had failed to meet this burden, that the Tax Court's finding to the contrary was clearly erroneous (Rule 52 (a), F. R. Civ. P.), and that therefore the taxpayers did not qualify for the exception to the generally accepted definition of "home" as the principal place of employment.[4] On this question of the

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consider whether allowance of the travel and living expenses here could be reconciled with the *Flowers* requirement that the travel must be in pursuance of the employer's business. In view of the course of the particular proceeding below, the Government makes no argument here that the deductions should be denied for failure to meet that requirement. However, as appears *infra*, pp. 29–30, the rationale of *Flowers* is relevant in construing the so-called "temporary employment" exception.

[3] Nor do taxpayers include *Wallace* in their lengthy table of cases (Br. iii–vi).

Wallace stands for the legal rule that "home" for the purpose of Section 23 (a) (1) (A) means, presumably in all cases, the family residence of the taxpayer. In the instant case, however, the taxpayers argue that the issue is really a "matter of evidence" (Br. 43) to be resolved by "a determination of fact" (Br. 50), and they urge that the decision below erroneously erects this "matter of evidence into a rule of law" (Br. 43).

[4] See *Commissioner* v. *Flowers*, *supra*, at 470:

"Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a

substantiality of the evidence, it is abundantly clear, as we shall also show (*infra*, pp. 27–32), "that the Court of Appeals has made a 'fair assessment' of the record" (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401), which, we submit, should not be independently reexamined by this Court.

A. A TAXPAYER'S "HOME" UNDER SECTION 23 (a) (1) (A) IS THE PLACE AT WHICH HE IS INDEFINITELY EMPLOYED

1. *The general rule: "home" is the post of duty*

As the Court noted in *Flowers*, the administrative rulings, dating from 1921, have treated the statutory home as the abode at the taxpayer's post of duty.[5] The same has been true since *Flowers*.[6] Likewise, the Tax Court, both before and after *Flowers*, has consistently followed the administrative interpretation in

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question of fact in most instances."

It should be noted that the rule of *Dobson* v. *Commissioner*, 320 U. S. 489, was rejected by Congress, subsequent to *Flowers*, in 26 U. S. C. 1141 (a), providing for review of Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury * * *." This provision was carried forward in the 1954 Code, 26 U. S. C. (Supp. V) 7482 (a). Rule 52 (a), F. R. Civ. P., provides that "Findings of fact shall not be set aside unless clearly erroneous * * *." See, *e. g.*, *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395.

[5] See, *e. g.*, O. D. 905, 4 Cum Bull. 212 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921); Mim. 2688, 4 Cum. Bull. 209 (1921); I. T. 1264, I–1 Cum. Bull. 122 (1922); I. T. 1355, I–1 Cum. Bull. 194 (1922); I. T. 1380, I–2 Cum. Bull. 88 (1922); I. T. 1404, I–2 Cum. Bull. 145 (1922); G. C. M. 4956, VII–2 Cum. Bull. 128 (1928); I. T. 3314, 1939–2 Cum. Bull. 152; G. C. M. 23672, 1943 Cum. Bull. 66.

[6] I. T. 3842, 1947–1 Cum. Bull. 11; Rev. Rul. 54–147, 1954–1 Cum. Bull. 51; Rev. Rul. 54–497, 1954–2 Cum. Bull. 75; Rev. Rul. 55–235, 1955–1 Cum. Bull. 274; Rev. Rul. 55–236, 1955–1

a wide variety of factual situations.[7] Under the circumstances, and in view of the repeated reenactment of the business traveling expense provision in successive revenue acts, the Treasury's interpretation must be deemed to have received implied legislative approval.[8] *Commissioner* v. *Flowers, supra,* at 469; *Helvering* v. *Winmill,* 305 U. S. 79; *Taft* v. *Commissioner,* 304 U. S. 351; *Brewster* v. *Gage,* 280 U. S. 327.

Since *Flowers,* the Court of Appeals for the Eighth Circuit has also adopted the Treasury's interpretation, saying that "Being away from home within the meaning of the tax statute does not necessarily mean being away from the place of abode without reference to the principal place of duty * * *." *Ney* v. *United States,* 171 F. 2d 449, 453, certiorari denied, 336 U. S.

Cum. Bull. 274; Rev. Rul. 55–571, 1955–2 Cum. Bull. 44; Rev. Rul. 55–604, 1955–2 Cum. Bull. 49; Rev. Rul. 56–49, 1956–1 Cum. Bull. 152.

[7] See, *e. g., Birler* v. *Commissioner,* 5 B. T. A. 1181; *Duncan* v. *Commissioner,* 17 B. T. A. 1088, affirmed *per curiam,* 47 F. 2d 1082 (C. A. 2d); *Schmidt* v. *Commissioner,* 11 B. T. A. 1199; *Priddy* v. *Commissioner,* 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. A. 5th); *Tracy* v. *Commissioner,* 39 B. T. A. 578; *Lindsay* v. *Commissioner,* 34 B. T. A. 840; *Peters* v. *Commissioner,* 19 B. T. A. 901; *Griesemer* v. *Commissioner,* 10 B. T. A. 386; *Brown* v. *Commissioner,* 13 B. T. A. 832; *Powell* v. *Commissioner,* 34 B. T. A. 655; *Schurer* v. *Commissioner,* 3 T. C. 544; *Gustafson* v. *Commissioner,* 3 T. C. 998; *Tyler* v. *Commissioner,* 13 T. C. 186; *Carroll* v. *Commissioner,* 20 T. C. 382.

[8] Section 214 (a) (1) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9); Section 23 (a) of the Revenue Acts of 1928 (c. 852, 45 Stat. 791), 1932 (c. 209, 47 Stat. 169), 1934 (c. 277, 48 Stat. 680), 1936 (c. 690, 49 Stat. 1648), and 1938 (c. 289, 52 Stat. 447). And see note 1, *supra.*

967. The Court of Appeals for the Fourth Circuit, citing *Flowers,* has held even more directly than it did in *Barnhill* that taxpayer's place of duty is his "home" within the meaning of Section 23 (a) (1) (A). *Bercaw* v. *Commissioner,* 165 F. 2d 521. And the Court of Appeals for the Second Circuit, also citing *Flowers,*[9] and in effect overruling its suggestion to the contrary in *Coburn* v. *Commissioner,* 138 F. 2d 763,[10] has stated flatly that "'Home' as used in the statute means the taxpayer's principal place of business or employment." *O'Toole* v. *Commissioner,* 243 F. 2d 302, 303.[11]

Indeed, since this Court's reversal of the Fifth Circuit *Flowers* decision, not a single decision by the Tax Court or the Courts of Appeals has held that "home" as used in the statute may mean an abode at some

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[9] The citation of *Flowers* in these opinions demonstrates that, although the decision in *Flowers* was actually placed on the ground that the travel of taxpayer there was not in pursuit of the business, it has also come to stand for the proposition that a taxpayer, in order to qualify for the travel expense deduction, must be away from his regular post of duty—*i. e.*, his "home." See also *Carragan* v. *Commissioner,* 197 F. 2d 246, 249 (C. A. 2d); *York* v. *Commissioner,* 160 F. 2d 385 (C. A. D. C.).

[10] Even in *Coburn,* the Second Circuit had said that, if the word "home" in Section 23 (a) (1) (A) were used in a special tax sense, it should be limited to the place where he is regularly employed or customarily carries on business during the taxable year (138 F. 2d at 764).

[11] Taxpayers are of course in error in asserting (Br. 37-38) that a holding that the post of duty is the tax "home" disqualifies every taxpayer for a deduction for travel expenses. In making the assertion, taxpayers are simply ignoring the difference between being and not being away from the post of duty—*i. e.*, the place where the taxpayer is regularly employed

place other than the taxpayer's post of duty. Apart from the rejected Fifth Circuit *Flowers* decision, the only appellate authority for that view is the pre-*Flowers* decision of the Ninth Circuit in *Wallace* v. *Commissioner, supra,* 144 F. 2d 407.[12] The fact is that the Wallace view has atrophied from lack of acceptance and disuse. As already noted (*supra,* pp. 14–15), apparently not even the taxpayers defend it. For this Court now to approve the *Wallace* view would be tantamount to an overruling of most of the decisions which passed on the issue prior to *Flowers,* and all the appellate decisions since.

Logic as well as authority requires the definition of "home" which the Commissioner and the lower courts generally have adopted. Despite taxpayers' effort (Br. 17–32) to separate consideration of Section 23 (a) (1) (A) of the 1939 Code from the omnibus disallowance of deductions for personal and living expenses in Section 24 (a) (1) (Appendix, *infra,* p. 36), this Court has said specifically that the former section "is to be contrasted with" the latter (*Commissioner* v. *Flowers, supra, at* 469). Viewed in this statutory set-

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by his employer. That difference is reflected, for example, by *Amoroso* v. *Commissioner,* 193 F. 2d 583 (C. A. 1st), certiorari denied, 343 U. S. 926, where the taxpayer was a manufacturer's representative with an office and residence in the Greater Boston area. While traveling on business a few days each week within the area, he was not away from "home"; but, while traveling in other parts of New England, he was away from "home" and qualified for the deduction.

[12] One district court decision stated its approval of the *Wallace* decision, but the taxpayer there failed to prove the amount of the deductions to which he was entitled and hence none was allowed. *Summerour* v. *Allen,* 99 F. Supp. 318 (M. D. Ga.).

ting, the allowance in Section 23 for business traveling expenses while away from home, inclusive of "meals and lodging," has a patent objective. It is designed to extend relief to a taxpayer who in pursuit of his trade or business must travel temporarily or intermittently away from the locality which is his regular post of duty. Were a taxpayer's expenses for meals and lodging at the locality of his post of duty and in commuting to and from it held deductible, the legislative mandate in Section 24 would be frustrated; for obviously all taxpayers engaged in trade or business must incur such living and personal expenses, wherever they may keep their living headquarters. Cf. *Commissioner* v. *Moran*, 236 F. 2d 595, 597 (C. A. 8th).

Such a view, moreover, would produce the incongruous result that subsistence and commuting expenses would remain nondeductible living and personal expenses under Section 24 if the taxpayer had his living headquarters in the locality of his post of duty, but would presumably be transformed into deductible business traveling expenses under Section 23 if he chose to maintain, in addition to living quarters in the neighborhood of his business (*e. g.*, New York), separate living quarters elsewhere which he regarded as his home (*e. g.*, Florida). It would impute to Congress an intention to discriminate against those taxpayers who have a single dwelling place in the vicinity of their working headquarters, and in favor of those who own or rent several dwelling places simultaneously, one in proximity to the place where they work and one or more elsewhere. See *Ney* v.

United States, 171 F. 2d 449 (C. A. 8th), certiorari denied, 336 U. S. 967; *York* v. *Commissioner*, 160 F. 2d 385 (C. A. D. C.).

There is no warrant in the language or legislative history of the statute for such a view. Even if the legislative purpose in this respect were not as plain as it is, "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse." *Colgate Co.* v. *United States*, 320 U. S. 422, 425. When the traveling expense provision is examined in conjunction with Section 24, it follows, we believe, that "while away from home" as used in Section 23 has reference to a temporary business trip away from an abode at the locality where the taxpayer is earning his livelihood, not to absence from an abode elsewhere.

If this general rule is applied in the instant case, it follows that the taxpayers were not "away from home" while employed at Kinston, the site of the construction job involved here; for Kinston was taxpayers' post of duty, and they had no other during the time they were there.[13]

2. The exception as to a temporary post of duty

Upon the general rule, however, the Tax Court has engrafted an exception—apparently of primary benefit to construction workers—which has been accepted by the Commissioner and which was applied in the instant case. Relying on its decisions in *Schurer* v. *Commissioner*, 3 T. C. 544, and *Leach* v. *Commissioner*,

[13] Certainly the cities of Wilmington and Raleigh, at or near which they maintained residences for their respective families, could not qualify as such, for in those places taxpayers had no employer or employment.

12 T. C. 20, the Tax Court held that taxpayers' post of duty at Kinston was temporary, as contrasted with indefinite or indeterminate, and that they therefore were entitled to the travel expense deduction since their family residences were located elsewhere.[14]

As demonstrated above, if the location of a taxpayer's family residence were generally determinative, every commuter would be entitled to the deduction, whereas commuters are the clearest category of taxpayers who are not entitled to the deduction.[15] *O'Toole* v. *Commissioner, supra*; *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C. A. 1st), certiorari denied, 343 U. S. 926; Treasury Regulations 118, Section 39.23 (a)-2 (Appendix, *infra*, p. 37). Therefore, in holding that these taxpayers were entitled to the travel expense deduction even while working at their only post of duty, merely because their family residences were located somewhere else, the Tax Court, in effect, held that a taxpayer's principal post of duty is his tax "home" *except* when that post of duty is temporary.

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[14] Compare *Bark* v. *Commissioner*, 6 T. C. 851; *Johnson* v. *Commissioner*, 8 T. C. 303; *Albert* v. *Commissioner*, 13 T. C. 129; *Warren* v. *Commissioner*, 13 T. C. 205; *Jones* v. *Commissioner*, 13 T. C. 880; *Carroll* v. *Commissioner*, 20 T. C. 382; *Hammond* v. *Commissioner*, 20 T. C. 285, affirmed, 213 F. 2d 43 (C. A. 5th); *Claunch* v. *Commissioner*, 29 T. C. No. 109, appeal pending (C. A. 5th); *Milne* v. *Commissioner*, decided September 29, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,231), affirmed *per curiam*, 181 F. 2d 503 (C. A. 3d). See also note 17, *infra*.

[15] Taxpayers' suggestion (Br. 29) that commuting expenses are not "personal" expenses within the meaning of Section 24 (a) (1) is clearly refuted by *Commissioner* v. *Flowers*, *supra*, p. 473: "Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal ex-

in which case his family residence may be his tax "home." [16]

Under this exception, a taxpayer who is employed temporarily at a particular place may be regarded as being "away from home" even though he has no other post of duty, whereas one whose employment is indefinite or indeterminate is not "away from home" and therefore not entitled to the deduction. The exception is ameliorative in nature, and is apparently based on the theory that it is inequitable to call the post of duty the tax "home" if the taxpayer, being there only temporarily, is forced by economic circum-

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penses lacking the necessary direct relation to the prosecution of the business."

And in *Commissioner* v. *Moran*, 236 F. 2d 595, 597 (C. A. 8), the court said:

"Everyone must have food and shelter. They are personal things essential to all of us alike, regardless of occupation. They do not lose their personal characteristics because they may contribute indirectly to a taxpayer's business activities. If that were not so, a taxpayer's lunch necessarily purchased away from home, his cost of going to the office or factory and returning, and innumerable other items would become business expenses of the individual taxpayer. It is true that certain expenses normally personal may become deductible by reason of intimate relation to an occupation carried on away from home or partially away from the principal place of doing business, but this is so because of the predominant business characteristics of the expense."

[16] Taxpayers are not completely accurate in stating (Br. 21) that a taxpayer "may have a business headquarters with his union local which is recognized as a 'tax home' under rulings issued by the Commissioner," citing a Special Ruling of May 4, 1956 (1956 P-H, par. 76, 519), and that the Commissioner has conceded that the headquarters of the respective union locals were taxpayers' "tax homes." In the Special Ruling, which relates only to nonitinerant construction workers, the Commis

stances to maintain a residence elsewhere.[17] On the other hand, it can not be said that a taxpayer is engaged in "traveling" if he is employed at a particular post of duty for an indefinite or indeterminate period. Assuming that such an exception is justified, the exception must be construed narrowly and strictly.[17a] Cf. *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 52.

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sioner recognized an exception to the general rule that the post of duty is the tax home, but that ruling is circumscribed by a number of important limitations. For example, the ruling, while stating that the business headquarters may be considered the tax home if the employment elsewhere is temporary and widely scattered, states that, in determining whether a taxpayer has such a business headquarters, such factors as the location of the taxpayer's residence, the place where he makes his employment contracts, and the locality to which he returns on the termination of temporary employment must be taken into consideration. In brief, as the Tax Court assumed in its opinion in the present case (R. 26–27), there must be no substantial difference between residence and union headquarters. Moreover, the Special Ruling is expressly inapplicable to taxpayers who are employed at any particular location for more than a year.

[17] It should be noted that, under the exception to the general rule, allowance of the deduction is not based solely on the fact of temporary employment. Thus, itinerant workers (*e. g.*, musicians) do not qualify for the deduction, on the theory that their home is synonymous with the place where they happen to be working at any given time. *Fisher* v. *Commissioner*, 23 T. C. 218, affirmed, 230 F. 2d 79 (C. A. 7th); *Mitnick* v. *Commissioner*, 13 T. C. 1.

Since the exception, as noted, generally inures to the benefit of taxpayers in petitioners' circumstances, it is difficult to understand their attack (*e. g.*, Br. 43–50) on the validity of this exception. Apart from this exception, it is clear that the Tax Court would have denied the claimed deductions.

[17a] Particularly is this so if taxpayers are also to be relieved of the *Flowers* requirement that the travel be in pursuit of the employer's business. See note 2, *supra*.

To bring himself within the exception and prove that his employment is temporary, a taxpayer, according to the criteria applied by the Tax Court in numerous cases, must show not only that the employment period is actually short,[18] but also that, prior to its commencement, it was anticipated to be short.[19]

[18] For example, in *Warren* v. *Commissioner*, 13 T. C. 205, the taxpayer left his wife and two children at the family residence in Cornelia, Georgia, and went to work at the Navy Yard in Charleston, South Carolina, for the duration of the war. The Tax Court said (p. 208):

"In the case at bar petitioner was continuously employed at one post of duty, the Navy Yard in Charleston, South Carolina, for more than two years. His employment there was not temporary, but indefinite. There is a well recognized difference between 'indefinite' employment and 'temporary' employment."

This language was subsequently quoted with approval in *Milne* v. *Commissioner*, decided September 29, 1949 (1949 P–H T. C. Memorandum Decisions, par. 49,231), affirmed *per curiam*, 181 F. 2d 503 (C. A. 3d).

In *Bark* v. *Commissioner*, 6 T. C. 851, the taxpayer accepted employment out of town for three months, but before that was completed, he agreed to stay on for another period, and then another. Altogether he remained about three years. The Tax Court denied the deduction, saying (p. 855):

"Although the petitioner well understood when he accepted his first employment with the Midvale Co. that it was to be for a period of only three or four months, the situation was vastly different so far as it relates to the year 1941. What was originally temporary employment had by 1941 become an employment of indeterminate duration."

[19] The requirement that shortness of duration be anticipated is demonstrated by cases in which the Tax Court found that the respective taxpayers were not away from home because their employment was indefinite. In *Ford* v. *Commissioner*, decided November 30, 1954 (1954 P–H T. C. Memorandum Decisions, par. 54,314), affirmed *per curiam*, 227 F. 2d 297 (C. A. 4th), the Tax Court said:

"Petitioner's employment at Front Royal was expected to continue for from 12 to 14 months. Actually, it extended over

With respect to the latter requirement, if the employment is not foreseen to be for a short (as distinguished from indeterminate) period, the taxpayer's assignment at the new post of duty cannot be properly characterized as "traveling" under the statute; and such a taxpayer, if he continues to maintain his residence at a distance from the job, is no more entitled to preferential tax treatment than other taxpayers who live at or near the site of their employment.

Accepting these legal criteria as controlling, the only question that remains is their application to particular facts. In the cases at bar, that factual issue was resolved in taxpayers' favor by the Tax Court, but

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a period of more than 24 months. Petitioner did not anticipated that his assignment to the project in Front Royal would be of short or 'temporary' duration. The fact of the matter is that the employment in Front Royal was to be for at least a year. While the assignment to Front Royal was not to be a permanent one, it clearly was not merely temporary. That its duration was indefinite does not bring it within the class of temporary employment, the termination of which within a short period could be foreseen."

Similarly, in *Albert* v. *Commissioner*, 13 T. C. 129, the Tax Court said, comparing the case to *Bixler* v. *Commissioner*, 5 B. T. A. 1181 (p. 131):

"The employment in each case lacked permanence, but, on the other hand, was indefinite in duration rather than obviously temporary, in that it was not the sort of employment in which termination within a short period could be foreseen, as was the situation in *Harry F. Schurer*, 3 T. C. 544, and *E. G. Leach*, 12 T. C. 20. The suggestion or warning that there might be a change of station upon short notice does not justify extensive discussion, since the evidence fails to show how probable this possibility was, except for the fact that the petitioner actually remained on duty in Lowell from 1943 until the end of 1945."

See also *Claunch* v. *Commissioner*, *supra;* Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, 79.

the Court of Appeals reversed. We suggest that this is the kind of factual issue that this Court should not independently reexamine, and that the holding of the Court of Appeals should not be disturbed.

B. TAXPAYERS FAILED TO MEET THEIR BURDEN OF PROVING THAT THEIR POST OF DUTY AT KINSTON WAS TEMPORARY

In the present case, the Court of Appeals reversed, as clearly erroneous, the Tax Court's finding that the taxpayers' post of duty at Kinston was temporary. Since the decision turns upon a question of fact, this Court, under principles recently reaffirmed, need go no further than determine that the Court of Appeals has made a "fair assessment" of the record. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401, 404. In the latter case, in circumstances similar to those here, an order of the Federal Trade Commission had been set aside by the Court of Appeals. On certiorari, this Court concluded that the decision of the Court of Appeals turned on a question of fact, and accordingly declined to reweigh the evidence. The Court stated (p. 401) that it would "intervene only in what ought to be the rare instance when the standard [of substantiality of the evidence] appears to have been misapprehended or grossly misapplied" (quoting *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491) and that it would "do no more on the issue of insubstantiality than decide that the Court of Appeals has made a 'fair assessment' of the record." See also *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503.

That the Court of Appeals has made such a "fair assessment" here seems clear. Indeed, even were this

Court inclined to reweigh the record *de novo,* it would find no basis upon which the Tax Court, applying its own previously established criteria, could properly have determined that taxpayers' jobs at Kinston were temporary.

1. *Taxpayers did not show that the actual duration of the jobs was short*

Taxpayers presented no evidence as to when the construction project at Kinston was actually concluded. Taxpayer Peurifoy worked there from March 10, 1952, until November 20, 1953, about 20½ months, by no means a short time; there was no showing that he could not have continued there longer if he had wished to do so. (Peurifoy Stip. par. 7 (b), R. 9.) Taxpayer Stines worked at the project from March 26, 1952, until April 10, 1953, about 12½ months, not a short time; he left for "personal reasons" (Stines Stip. par. 8 (a), R. 12), and might otherwise have continued to work there for an unknown additional length of time. Taxpayer Hall worked at the Kinston project from October 21, 1952, through July 10, 1953, about 8½ months; he also resigned for "personal reasons" (Hall Stip. par. 8 (b), R. 16), and he too might otherwise have continued to work there for an unknown additional length of time.

The record thus plainly fails to support the Tax Court's finding that taxpayers' post of duty at Kinston was temporary. It even fails to establish, at least with respect to Peurifoy and Stines,[20] that the actual

[20] If the 8½ months actually spent by Hall on the job may be considered short, the cases show that shortness alone is not cause for labeling employment temporary rather than indefi-

period of time spent at Kinston was short. And, with respect to all three taxpayers, the record fails to establish that their employment could not have been actually longer than it was. The latter criterion—the duration of the jobs for which the taxpayers were hired, rather than the time the taxpayers spent on those jobs—is necessarily the prime consideration. For example, two of the taxpayers—Hall and Stines—resigned for "personal reasons." It can hardly be contended that a taxpayer hired for an indefinite or indeterminate period can make his post of duty "temporary"—and his living expenses deductible—simply by taking another job elsewhere "for personal reasons."

As this Court said in *Flowers*: "Business trips are to be identified in relation to business demands and the

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nite. *Whitaker* v. *Commissioner*, 24 T. C. 750 (222 days); *Carroll* v. *Commissioner*, 20 T. C. 382 (308 days); *McGinley* v. *Commissioner*, decided May 22, 1956 (1956 P-H T. C. Memorandum Decisions, par 56,124) (6 months); *Pauley* v. *Commissioner*, decided November 16, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,298) (one year, 3 months, and 18 months); *Harrington* v. *Commissioner*, decided April 22, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,139) (9 months, 15 months and 11 months); *Bryson* v. *Commissioner*, decided January 13, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,016) (separate employments of about 9 months and 50 weeks); *Pennington* v. *Commissioner*, decided October 31, 1950 (1950 P-H T. C. Memorandum Decisions, par. 50,257) (6 months); *Taylor* v. *Commissioner*, decided March 17, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,034) (8 months and 11 months); Rev. Rul. 54-497, 1954-2 Cum. Bull, 75, 80 (3 or 4 months). Moreover, Hall resigned for "personal reasons" and, as pointed out in the text, can hardly be allowed to claim that the time he chose to spend at Kinston is the equivalent of the duration of the job for which he was hired.

traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here." 326 U. S. at 474. See footnote 2, p. 14, *supra*.

2. *Taxpayers did not show that the jobs were anticipated to be of short duration*

Not only did the taxpayers fail to prove that the duration of their jobs at Kinston was short in fact, but they also failed to meet the second requirement of a "temporary" post of duty—*i. e.*, that the jobs were foreseeably short (*supra*, pp. 25–26). The only testimony in this regard was that of taxpayer Hall, of which the Tax Court said (R. 28):

> The petitioner Hall testified that when they entered upon a job at a particular site, including the Kinston job, they were not guaranteed the job for any specified time and did not know how long they would be employed there, although there was usually some hearsay information as to the duration of the work.

Certainly nothing in this statement indicates that the duration of taxpayers' employment was foreseen to be short or definite; on the contrary, it indicates indeterminateness and indefiniteness.

In this state of the record, the Tax Court, in effect, indulged in little more than a presumption that the foreseeable duration of the employments at Kinston was short and fairly definite; for there was no evidence of this. On the contrary, the evidence is equally consistent with the hypothesis (for example) that the Kinston project would last four or five or

more years. The Tax Court stated that there was no reason for taxpayers to believe that the nature of the employment at Kinston would be any different from that of other jobs which formed the general pattern of their employment. That, however, did not support the finding of the court that the employment at Kinston was temporary; for the evidence as to the general pattern of taxpayers' employment experience *prior* to the employment at Kinston is sparse and inconclusive, and such experience as was indicated could not have been very helpful to taxpayers in determining whether their employment at Kinston was going to be temporary or indefinite.[21]

The determination of the Commissioner is presumed to be correct and the burden lies upon taxpayers to prove his determination erroneous. *Welch* v. *Helvering,* 290 U. S. 111, 115. In order to carry that burden, taxpayers had to demonstrate *inter alia* that they were "away from home" while employed at

[21] All that the record shows about this period is that Peurifoy worked on a paper mill project at Acme, North Carolina, for 7 months (Peurifoy Stip. par. 7 (a), R. 9); that since becoming a member of the union in 1947, Stines "has worked on different projects in the States of Virginia, North Carolina, South Carolina, Georgia and Florida" (Stines Stip. par. 7, R. 12); and that after he joined the union, Hall's only job prior to the one in issue was for approximately one year at Neuse, North Carolina (Hall Stip. p. 8 (a), R. 16).

The Commissioner conceded—rightly or wrongly—that the employments of Stines at Charleston, South Carolina, for about three weeks, and at Fort Bragg, North Carolina, for about 7½ weeks, were temporary, but these employments *followed* the employment at Kinston. (R. 13-14.) All the other employments of taxpayers may or may not have been temporary.

Kinston. To do so, it was necessary to establish that the employment at Kinston was temporary; and that in turn, by the Tax Court's own criteria, required a showing that the employment was foreseen to be short and actually was short.[22] Taxpayers failed to prove either; and the Tax Court's finding to the contrary, therefore, was clearly erroneous, as the Court of Appeals held. At all events, we submit, on this record there is no basis for this Court to disturb the determination made by the Court of Appeals on this factual issue.

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[22] The taxpayers (*e. g.*, Br. 23, 25, 53) emphasize that the Commissioner's statutory 90-day letters denied the claimed deductions on the ground that the expenses were "personal and living" expenses. From this premise, taxpayers apparently argue (Br. 53) that they had no burden to show that their employment at Kinston was temporary. But the Commissioner's determination that the expenses were "personal and living" expenses obviously negatived the taxpayers' claimed eligibility for the travel expense deduction under Section 23 (a) (1) (A). See p. 19, *supra*. That being so, to overcome the Commissioner's determination, and to obtain the deduction, it was incumbent on the taxpayers to establish that their expenditures were incurred "away from home" within the meaning of Section 23 (a) (1) (A), either under the general rule or under the exception. To do the latter, it was, of course, essential to show that their employment at Kinston was temporary.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

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(n) [As added by Section 8 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Definition of "Adjusted Gross Income".*—As used in this chapter the term "adjusted gross income" means the gross income minus—

* * * * *

(2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [As amended by Section 127 (b), Revenue Act of 1942, *supra*] Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.22 (n)–1. *Adjusted gross income.* (a) The term "adjusted gross income" means the gross income computed under section 22 minus such of the deductions allowable under section 23 as are specified in section 22 (n). * * *

(b) Section 22 (n) does not create any new deductions, but merely specifies which of the deductions provided in section 23 shall be allowed in computing adjusted gross income. The circumstance that a particular item is specified in one of the clauses under section 22 (n) and is also embraced within the terms of another of such clauses does not permit the item to be twice deducted in computing adjusted gross income.

(c) The deductions specified in section 22 (n) for the purpose of computing adjusted gross income are: (1) Deductions allowable under section 23, which are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee; (2) deductions allowable by section 23 which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee; (3) deductions allowable by section 23 (other than expenses of travel, meals, and lodging while away from home) which consist of expenses

paid or incurred in connection with the performance of services as an employee under a reimbursement or other expense-allowance arrangement with his employer; * * *

(d) For the purpose of the deductions specified in section 22 (n) the performance of personal services as an employee does not constitute the carrying on of a trade or business. * * *

* * * * *

Sec. 39.23 (a)–1. *Business expenses.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Among the items included in business expenses are * * * traveling expenses while away from home solely in the pursuit of a trade or business * * *.

Sec. 39.23 (a)–2. *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. * * *

* * * * *

(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

(g) A taxpayer claiming the benefit of the deductions referred to in this section must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business

during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

(h) Claim for the deductions referred to in this section must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

(i) Commuters' fares are not considered as business expenses and are not deductible.

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